87-597

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

ARTHUR B. ROBINSON,

Petitioner.

v.

Secretary of the Department of Transportation and ALLAN McARTOR, National Administrator of the Federal Aviation Administration,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE PLAINTIFF, ARTHUR B. ROBINSON, PRESENT DIRECT EVIDENCE OF DISCRIMINATION AND IF SO, MUST THE DEFENDANT, FEDERAL AVIATION ADMINISTRATION, REBUT THE PLAINTIFF'S CASE BY A PREPONDERANCE OF THE EVIDENCE?

II. DID THE TENTH CIRCUIT COURT OF APPEALS APPLY THE CORRECT STANDARD IN ITS ANALYSIS OF THE SHIFTING BURDEN OF PROOF IN ROBINSON'S TITLE VII CASE?

III. DID THE TRIAL COURT ERR IN ITS CONCLUSION THAT THE REASONS OFFERED BY THE FAA FOR ROBINSON'S DISCHARGE WERE NOT MERE PRETEXTS FOR DISCRIMINATION?

IV. DID THE TRIAL COURT IMPROPERLY EXCLUDE CASSETTE TAPES OF ROBINSON'S PERFORMANCE FROM THE EVIDENCE?

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2. United States District Court for the District of Colorado, Case No. 81-704, decided June 30, 1983.

3. Equal Employment Opportunity Commission, Petition No. 03800169, decided April 9, 1981.

4. Merit Systems Protection Board, Decision No. DEO75209051, decided may 1, 1980.

5. Facility Employee Performance Review Board, Case No. DV-531, decided August 21, 1979.

IN THE

OCTOBER TERM 1987

NO.

ARTHUR B. ROBINSON,

Petitioner,

v.

Secretary of the U.S. Department of Transportation, et al.

Respondent.

I. STATEMENT OF JURISDICTION

Plaintiff appellant, Arthur B. Robinson, appeals from the judgment entered by the U.S. Court of Appeals for the Tenth Circuit on June 30, 1987, which affirmed an adverse judgment entered by the U.S. District Court for the District of Colorado on June 30, 1983. After a trial to the court, the U.S. District Court found that Robinson's race was not a factor in the denial of his certification and the resulting termination of his employment with the Department of Transportation Federal Aviation Administration (hereinafter, "FAA"). Accordingly, the trial court found that Robinson was not entitled to relief under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C., Section 2002.

Robinson submits this Petition for Certiorari pursuant to 28 U.S.C., Section 1254(l) and requests that the

United States Supreme Court review his case to determine whether the decision of the Federal District Court was clearly erroneous.

The Tenth Circuit Court of Appeals has rendered a decision in Robinson's case which is in conflict with a U.S. Supreme Court decision and decisions of other federal courts of appeals on the same matter. It is of imperative public importance that all federal courts of appeals apply the same standard in employment discrimination cases under Title VII. Thus, appellant requests that the United States Supreme Court invoke its discretionary jurisdiction in this case.

II. STATEMENT OF THE CASE

This action was instituted after Robinson was terminated on December 14, 1979, from the training program of the FAA for air traffic controllers in Colorado. Robinson originally entered the training program on August 16, 1971. (T.R. Vol. I, p. 14). Robinson progressed through the program successfully until June, 1974, when he commenced sector training. Sector training is actual on-the-job air traffic control work within one of several sections of the sky in the region surrounding the Denver area. To complete his training, Robinson was assigned to Sector 31, one of the lowest traffic volume sectors in the Denver region. (T.R. Vol. I, pp. 31-32).

On a determination that Mr. Robinson was not progressing satisfactorily, a decision was made to terminate his employment in December, 1974. Subsequent

to his termination, Robinson, a black male, filed a discrimination complaint alleging he was trained on a particularly low volume traffic sector, whereas anglo trainees were placed in high volume sector training. (T.R. Vol. I, pp. 32-33).

On September 7, 1976, the Department of Transportation Merit System Protection Board (MSPB) issued its decision in favor of Mr. Robinson. The MSPB held that:

> Complainant had been assigned to a sector with very light traffic. Caucasian trainees assigned to the same supervisor had been assigned to high altitude sectors which were conducive to good training. Section 31, to which complainant was assigned, provided poor training opportunities.

The MSPB then directed that Mr. Robinson be retroactively restored to the position of air traffic control specialist, GS-9, and provided with the necessary training to reenter the air traffic control training program. The MSPB further directed that Mr. Robinson be given full and fair training, and if such training was successfully completed, Mr. Robinson should be promoted retroactively according to the dates he would have been promoted if he had been afforded the opportunity to successfully complete his training. (See, MSPB decision - Appendix).

Thus, the FAA admitted that it had discriminated against Mr. Robinson on the basis of race and voluntarily undertook the affirmative duty of providing full and fair training to compensate for the prior discrimination.

During the pendancy of his original complaint, the training program had been reorganized from a three-phase program to a thirteen-phase program. (T.R. Vol. II, pp. 102-103). Upon his return to employment, Mr. Robinson reentered the program at phase eight.

Needless to say, Robinson suffered tremendous setbacks, both as the result of being the victim of discrimination, and because of the two year delay in his professional advancement. The necessity of switching to a new program in the middle of his training added even more stress to his already difficult position.

The new thirteen-phase program was designed by the FAA to be cumulative in nature. Each area of air traffic control is covered by classroom instruction which is immediately followed by supervised on-the-job training. The on-the-job training provides the hands-on experience which follows up and solidifies the theoretical background provided by the classroom instruction. (T.R. Vol. II, p. 111).

Robinson successfully completed phases eight and nine and was progressing through phase ten when a position opened for phase eleven classroom radar training. The radar portion of the training encompasses phases eleven, twelve and thirteen of the program. At the request of his supervisor, Doak Adair, Mr. Robinson agreed to proceed with phase eleven radar training, even though he had not yet finished phase ten non-radar training. (T.R. Vol. I, p. 43).

On November 18, 1978, Robinson successfully completed phase eleven classroom radar training, but before he could proceed on to phases twelve and thirteen of on-the-job radar training, he had to go back and finish the

phase ten on-the-job non-radar training. (T.R. Vol. I, pp. 43-44).

The FAA admits that taking these courses out of sequence in this manner is not the normal procedure that is generally followed in training air traffic controllers. Robinson's immediate supervisor, Doak Adair, did not have any other trainees under his supervision who had taken courses out of sequence. (T.R. Vol. III, p. 98). However, one other white male also stopped in phase ten training to enter into phase eleven classroom radar training, and then went back to finish phase ten out of sequence before proceeding on to phase twelve.

Robinson's entry into phase twelve was delayed even longer than his one white male counterpart, because Robinson experienced difficulty in receiving credible training hours due to lower traffic volumes and staff vacations in the months of December and January when he finished phase ten training. (T.R. Vol. I, pp. 56-57). During this period Mr. Robinson often had to run the flight printer, and had little opportunity to engage in actual air traffic control work. (T.R. Vol. I, p. 49). The flight printer work is menial activity that placed Robinson in a position subordinate to the other air traffic controllers. In addition, his phase ten certification papers were mysteriously lost, which resulted in even more delay before he could move back to phase twelve on-the-job radar training.

The training delay was serious enough to be noticed by Mr. Benham Ignacio, the Assistant Manager for Training at the Denver Center. On March 9, 1979, Mr. Ignacio sent a letter to Assistant Chief Roger Clark, inquiring why Robinson had received such a small amount of credible training and why over four months had

elapsed since he completed radar classroom training and was not yet into radar on-the-job training. (T.R. Vol. III, pp. 6-8, and p. 43).

As a result of the delays, Robinson did not enter into phase twelve radar on-the-job training until March, 1979, over four months after he had completed the classroom radar instruction. For this training, Robinson was assigned to George Schrader as the instructor. Mr. Schrader is a very fundamentalist person who takes pride in his nickname of "Gun Toting, Bible Banging Bigot." After 72 hours of training, Schrader concluded that Robinson's performance was unsatisfactory. (T.R. Vol. I, pp. 52-53).

Robinson's supervisor during the radar training was Doak Adair. Robinson had experienced some prior comments from Mr. Adair which were racially motivated. At one time when Robinson was facing difficulties in his work, Adair had told Robinson that if he failed as an air traffic controller, Adair could get him a job in the Greenwood, Mississippi Flight Service Station. This comment created an inference that Robinson was destined for failure as an air traffic controller. (T.R. Vol. I, p. 52).

During the Phase 12 and 13 on the job training, cassette tapes of Robinson's performance were made by George Shrader and his second instructor, James Carr. When Mr. Robinson questioned his supervisors why the tapes were being made on a daily basis, their response was that the tapes were made so that Robinson could listen to his own performance. In their opinion, the cassette tapes would provide the best source of information on how well Mr. Robinson was progressing. Mr. Robinson agreed to listen to some of the tapes, although it

seemed to him that the procedure of taping him on a daily basis was quite unusual. (T.R. Vol. I, p. 65).

In July, 1979, Robinson was given a certification test, which was not conducted according to normal procedures. The test consists of actual air traffic control by the student in his sector of air space. Usually the student's own instructor plugs in and observes the exam, while another instructor grades the trainee on his performance. In Mr. Robinson's case, a third additional instructor observed and stood by to intervene, while Robinson's own instructor, Mr. Carr, also observed from a distance. (T.R. Vol. I, pp. 67-69). During the certification test a thunderstorm broke out in the Denver area, which caused the test to be conducted under unusual weather conditions. (T.R. Vol. I, p. 69).

Robinson did not pass the certification test and his certification was denied. Based upon his failure to successfully complete a certification check, Robinson was eventually terminated from his employment. (T.R. Vol. I, p. 88). According to Department of Transportation procedures, Robinson requested the Facility Employee Performance Review Board to review his training. The Board affirmed the decision that Robinson's training should be terminated and recommended he be offered reassignment to a position in a flight service station.

Robinson appealed to the Merit Systems Protection Board. The removal was affirmed after a hearing. Robinson then appealed to the Equal Employment Opportunity Commission, which appeal was also denied. This case was then filed in the United States District Court for the District of Colorado.

Jurisdiction in the District Court for the District of Colorado was predicated upon Mr. Robinson's right to receive a trial de novo as provided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq.

III. LEGAL ARGUMENT

A. THE FAA MUST BE HELD TO A HIGH STANDARD OF SCRUTINY, BECAUSE OF PRIOR DISCRIMINATION AGAINST ROBINSON.

Arthur Robinson filed a complaint alleging that he was a victim of disparate treatment because of his race. In the case of International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977), the United States Supreme Court set forth the basic allocation of burdens and order of presentation of proof in a disparate treatment case under Title VII of the Civil Rights Act. Under a disparate treatment theory of discrimination, the plaintiff must establish that the employer treats some people less favorably than others because of race, color, religion, sex, or national origin. The plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. See, Coe v. Yellow Freight System, Inc., 646 F.2d 444 (Tenth Cir.1981).

In order to prove a prima facie case the plaintiff must establish that he applied for an available position, he was qualified for the position, and he was rejected under circumstances which give rise to an inference of unlawful discrimination in that his failure to be hired, transferred or promoted is more likely than not based on con-

sideration of impermissible factors. The establishment of a prima facie case creates the presumption of discrimination.

After the prima facie case is established, the defendant must rebut the presumption by establishing a legitimate, nondiscriminatory reason for failure to hire, promote or transfer the plaintiff. If the Defendant rebuts the presumption, the plaintiff then has the burden to demonstrate that the reasons offered by defendant are mere pretexts for discrimination and thus that the defendant intentionally discriminated against plaintiff. This means that in a disparate treatment case an individual plaintiff must prove discriminatory motive on the part of the defendant, once the Defendant has properly rebutted the Plaintiff's prima facie case.

In the Robinson case, the trial court held that plaintiff had established a prima facie case of racial discrimination. In its opinion, on page 3, the trial court found as follows:

> The plaintiff has established a prima facie case of racial discrimination, based upon the legitimate inference of continuing effects from the previous discriminatory denial of an equal training opportunity. The agency had an affirmative obligation to remedy that past discrimination by providing effective training.

The Trial Court incorporated the evidence of prior discrimination into its analysis of whether Robinson stated a prima facie case. The Trial Court properly concluded that Robinson did establish a prima facie case of racial discrimination.

In light of the admitted prior discrimination, any reasons offered by the FAA as explanation of Robinson's treatment should also be highly suspect. A defendant who has engaged in prior discrimination should bear a very high burden of proving that relief should not issue despite a finding of employment discrimination. See, Milton v. Weinberger, 696 F.2d 94, 225 U.S.App D.C. 12 (C.A.D.C. 1982).

B. THE TENTH CIRCUIT DID NOT APPLY THE CORRECT STANDARD FOR A TITLE VII CASE INVOLVING DIRECT EVIDENCE OF DISCRIMINATION.

1. Direct evidence of discrimination mandates that the FAA be held to a higher burden of proof.

In the case of Wilson v. City of Aliceville, 779 F2d 631 (11th Cir. 1986), the Eleventh Circuit Court of Appeals held that direct evidence of discrimination places a higher burden on the employer. In the Wilson case the court held that the defendant presented with direct evidence of discrimination can rebut the presumption that the hiring decision was improperly motivated only by proving by a preponderance of the evidence that the same decision would have been reached even absent impermissible factors.

On page 634 the Court found as follows:

> Where, however, there is direct evidence of discrimination the McDonnell Douglas Douglas analysis is inapplicable. Miles v. M.N C. Corp., 750 F.2d 867, 875 (11th Cir.1985); Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556

> Cir. 1983); Lee v. Russel County Board of Education, 684 F.2d 769, 774 (11th Cir.1982). A defendant presented with direct evidence of discrimintion can rebut the presumption that the hiring decision was improperly motivated only by proving by a preponderance of the evidence that the same decision would have been reached even absent the impermissible factor. Lee v. Russell County Board of Education, 684 F.2d 769, 774 (11th Cir. 1982) (citing Mt. Healthy City School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Direct evidence of discrimination cannot be met by a McDonnell Douglas rebuttal, Lee v. Russell County Board of Education, at 776, such as was presented by the defendants here. It thus becomes apparent that appellant's chances of prevailing on appeal turn on the existence of direct evidence of discrimination.

In certain cases where the evidence of discrimination is so strong that the plaintiff has created a prima facie case with direct evidence, the defendant will have the burden of rebutting the presumption by a preponderance of the evidence, rather than merely coming forward with evidence.

This principle was set forth by the Supreme Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 63, 83 L.Ed.2d 523 (1985). In that age discrimination case, the Supreme Court held that the McDonnell Douglas test is inapplicable where the Plaintiff presents direct evidence of discrimination. See also, Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977).

The D.C. Circuit, the Fifth Circuit and the Third Circuit also follow this analysis in holding the Title VII Defendant to a higher burden of proof when confronted with direct evidence of discrimination. See, Gavalik v. Continental Can Co., 812 F.2d 834 (3rd Cir. 1987); Goodman v. Lukens Steel Co., 777 F.2d 113, 130 (3rd Cir. 1985); Guillory v. St. Landry Parish Police Jury, 802 F.2d 822, 824 (5th Cir. 1986); Baxter v. Savannah Sugar Refining Corporation, 495 F.2d 437, 444-445 (5th Cir.), cert. denied, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974); Walters v. City of Atlanta, 803 F.2d 1135, 1143 (11th Cir. 1986).

In Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976) the D.C. Circuit analyzed the Defendant's burden of proof as follows:

> And those courts which have given the most careful consideration to the burden of proof question have held that the employee must prevail unless the employer proves its case by "clear and convincing evidence."
> Baxter v. Savannah Sugar Refininng Corporation, supra; 495 F.2d at 437; Pettway v. American Cast Iron Pipe Co., supra, 494 F.2d at 259-260; Johnson v. Goodyear Tire & Rubber Co., supra, 491 F.2d at 1374-1380; Cooper v. Allen, 467 F.2d 836, 840 (5th Cir. 1972).

The court stated that this ensures that the principle burden of establishing the absence of discrimination is placed upon the party who has the facts peculiarly within its own knowledge. This conforms to the evidentiary principle set forth in United States v. New York, N.H. & H.R. Co., 355 U.S. 253, 256 n.5, 78 S.Ct. 212, 2 L.Ed.2d 247 (1957).

In Robinson's case, the FAA admitted that it previously discriminated against Robinson, and issued a directive that Robinson be given full and fair training. The training that Robinson received was characterized by direct evidence of continuing discriminatory attitudes on the part of Robinson's instructors.

The first instructor who failed Robinson, George Shrader, was a self-proclaimed "Gun Toting, Bible Banging Bigot." Robinson's supervisor, Doak Adair, had previously commented that "if Robinson failed, he (Adair) could always get him a job in the Greenwood Mississippi Flight Service Station."

Shrader's nickname and Adair's statement are both highly probative on the issue of racial discrimination, because these two instructors were responsible for carrying out the directive that Robinson should be given full and fair training.

In Robinson's case the Court did allow this evidence into the record. The issue thus narrows down to whether the trial court's failure to treat the nickname and the statement as direct evidence of discrimination was clearly erroneous. The nickname and the statement are unambiguous racial slurs. When added to the context of the admitted prior discrimination against Robinson, both the nickname and the statement should have been afforded a great deal more weight than the Trial Court gave them.

Had the Trial Court considered the nickname and the statement as direct evidence of discrimination, then it would have required the FAA to prove its nondiscriminatory reasons by a preponderance of the evidence.

2. The Tenth Circuit Court of Appeals did not properly analyze the evidence of discrimination.

The Tenth Circuit Court of Appeals held that the FAA only needed to come forward with evidence of a legitimate, nondiscriminatory reason for refusing certification of Robinson. On page 5 of its opinion, the Tenth Circuit held as follows:

> Defendants came forward with evidence showing a legitimate, nondiscriminatory reason for refusing certification. Plaintiff then had the burden of proving by a preponderance of the evidence that a discriminatory reason more likely motivated the Defendants so that Defendant's proferred explanation was unworthy of belief.

In its analysis of the shifting burden of proof in a discrimination case, the Tenth Circuit only requires the Defendant to come forward and produce evidence of a legitimate, nondiscriminatory reason for its treatment of the plaintiff. The Tenth Circuit does not question whether a Plaintiff has set forth direct evidence of discrimination. Thus, the Tenth Circuit does not require a Defendant to prove its nondiscriminatory reasons by a preponderance of the evidence, even where direct evidence of discrimination does exist on the record.

The Tenth Circuit did not question whether direct evidence of discrimination existed on the record, and thus did not make the determination of whether the FAA should have proven that its motive was nondiscriminatory by a preponderance of the evidence. The Tenth Circuit failed to follow the standard set forth in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111,

121, 105 S.Ct. 63, 83 L.Ed.2d 523 (1985). The Trans World case modified the McDonnell Douglas test to include a determination of whether the Title VII Plaintiff has set forth direct evidence of discrimination. If direct evidence does exist on the record, then the Court of Appeals must analyze whether the Trial Court required the Defendant to prove its nondiscriminatory motive by a preponderance of the evidence.

If the direct evidence of discrimination against Robinson had been given the proper weight in this case, the Tenth Circuit would have held as the Supreme Court and the Eleventh, Fifth and D.C. Circuits have held. Thus, the FAA should have been required to show, by a preponderance of the evidence, that it had a legitimate, nondiscriminatory reason for refusing to certify Robinson as an air traffic controller.

The failure of the Tenth Circuit to follow the standard of the Trans World case has resulted in the denial to Mr. Robinson of equal treatment under Title VII. If the FAA is held to a lighter evidentiary standard in the Tenth Circuit than it is in the Eleventh and Fifth Circuits, then FAA employees, like Robinson, who live in the Tenth Circuit have greater difficulty in proving discrimination. Thus, it is easier for the FAA to discriminate on the basis of race, color, religion, sex or national origin in the Tenth Circuit.

It is imperative that this difference be resolved by the United States Supreme Court because under the present application of separate standards, plaintiffs such as Robinson are denied the right to a fair analysis in accordance with the reasoning in Trans World Airlines v. Thurston, supra.

C. THE REASONS OFFERED BY THE FAA FOR ROBINSON'S DISCHARGE ARE MERE PRETEXTS FOR DISCRIMINATION.

1. Failure to follow its own procedures establishes thatthe FAA discriminated against Robinson.

In 1976, Mr. Robinson reentered the air traffic control training program. Due to the prior reorganization of the training program, it was necessary for Robinson to reenter at Phase 8, rather than Phase 1. After spending two years away from the program, Robinson had to switch to the new program in the middle of his training. From that point on, Robinson's entire history of training is characterized by a departure from normal procedures.

Although the on-the-job training was designed to follow up the classroom instruction, Robinson had to delay his on-the-job radar training for over four months, because he had to take classes out of sequence, and because of the delays caused by light traffic in his sector and the loss of his certification papers.

The certification test which Robinson took was also not conducted according to normal procedures. Usually only two instructors are present when a certification test is given to an air traffic control student. In Robinson's case a third, and unfamiliar instructor was also present. Although the FAA claims that the third instructor was placed in the test to avoid charges of unfair treatment, the actual result was that the presence of a third party created unnecessary anxiety for Mr. Robinson during his certification test.

The existence of a thunderstorm during Robinson's certification test can also be questioned. Under normal procedures, air traffic control trainees are generally tested under normal weather conditions.

When all of these factors are taken into consideration, it is clear that general procedures were not followed in the training of Mr. Robinson. Mr. Robinson had to take classes out of sequence, and was delayed in his training, and often had to run the flight printer instead of performing air traffic control
work. The presence of a third additional party at his certification test was the culmination of a history of training that departed from normal procedures.

The case of Morrison v. Booth, 763 F.2d 1366(11 Cir.1985) establishes that departures from normal employment procedures may be suggestive of discrimination. Subjectivity in employment decisions have always been looked upon with increased scrutiny. When the normal procedures are altered in a particular employee's situation, it gives rise to a question of whether a discrim- inatory motive may be behind the departure from normal employment practices.

In Robinson's case the normal training and certification procedures were not followed. Failure to follow normal training and certification procedures becomes highly suspect when considered along with the fact that both of Mr. Robinson's instructors had previously made derrogatory racial comments.

The FAA attempts to justify its actions by the fact that one other white male also had to take training classes out of sequence. The record establishes that there were some white trainees who also experienced delay be-

tween classroom instruction and on-the-job training. However, the entire trial record fails to show evidence of any trainee other than Mr. Robinson who experienced all three departures from normal procedures. The FAA was not able to point to another trainee who had to take classes out of sequence, who experienced a four month delay between classroom instruction and on-the-job training, and who had to deal with the presence of a third instructor during the certification test. In fact, there were no other white trainees who were similarly situated to Robinson in that no other white trainees were forced to undergo the extensive departure from normal training procedures that Robinson was forced to undergo. Accordingly, it is clear that the reasons stated by the FAA for Robinson's termination were mere pretexts for discrimination.

2. FAA employment statistics establish that the FAA discriminated against Robinson.

Although statistics are most often used in a disparate impact theory of discrimination, it is proper to use statistics to rebut a defendant's explanatory defenses as pretextual. In the case of Cook v. Boorstin, 763 F.2d 1462(D.C.Cir.1985), the Court held that statistical evidence may be used to prove disparate treatment claims. A disparate treatment plaintiff may employ statistics concerning the employment practices of the defendant to rebut explanatory defenses as pretextual. See, Schwepp v. Miller Brewing Co., 708 F.2d 655 (11th Cir.1983).

During the period of August 16, 1971, to December 14, 1979, the number of blacks employed as air traffic controllers and as air traffic controller trainees was very

minimal. In the year 1972, four blacks were hired as trainees out of twelve hired trainees.

From 1973 forward, there was a significant reduction in the percentage of black Denver Center trainees. Out of 30 trainees hired, none were black. In 1974, 2 black trainees were hired out of a total of 27, or approximately seven percent (7%). In 1975, there were 24 trainees hired, and none were black. In 1976, 6 trainees were hired and 2 were black. Therefore, between 1973 and 1976 only seven and one half percent (7.5%) of the trainees hired were black. In 1977, 55 trainees were hired, 2 of whom were black. The percentage of blacks to the total hired was approximately three and one half percent (3.5%). In 1978, 29 trainees were hired, none of whom were black. In 1979, through December 14 of that year, 20 trainees were hired, 1 of whom was black, which would be only five percent (5%) of the total.

The testimony is clear by both Robert Smith and Mr. Robinson that the only black who became an air traffic controller during this period of time in the north sector was Smith. Therefore, none of the 11 black trainees out of the total from 1972 to December 14, 1979 were hired as north sector air traffic controllers. Taking the total number of trainees hired from 1972 through December 14, 1979, a total of 11 out of 223 were black. That is approximately a 4.9% representation of blacks over the eight year period of 1972 through 1979.

These statistics establish that a very small percentage of blacks are hired as trainees, and an even smaller percentage actually achieve the status of journeyman air traffic controller. From these statistics the inference can be drawn that black trainees in general do not receive an equal opportunity to succeed as air traffic controllers

in the Denver region. These statistics are direct evidentiary proof that can be used to rebut the explanatory reasons of the FAA as mere pretexts for discrimination against Arthur Robinson.

D. THE TRIAL COURT IMPROPERLY EXCLUDED CASSETTE TAPES OF ROBINSON'S PERFORMANCE FROM THE EVIDENCE.

Robinson's two instructors both testified that one of the reasons for fialing Robinson was his alleged lack of ability to communicate, and in particular, a tendency to stutter and poor speech quality.

The instructors had taped Robinson on each day that he was taking his on-the-job radar training. The tapes of these sessions provide the best evidence of Robinson's ability to communicate. A review of the tapes would be the best way to determine whether Robinson displayed poor speech quality and a tendency to stutter.

At trial, Robinson introduced two of these cassette tapes as representative samples of his performance during his on-the-job training. One of the tapes was recorded on the day that Robinson was given his certification test. The Trial Court refused to admit the tapes into evidence, and cited surprise and unnecessary delay as its reasons (Pages 81 through 85 of Volume I of the Trial Transcript are attached to the Appendix.)

Rule 403 of the Federal Rules of Evidence allows relevant evidence to be excluded on the grounds of prejudice, confusion or waste of time. Rule 403 is set forth as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403 does not list surprise as a ground for exclusion. Although a party may claim unfair surprise, it is better to grant a continuance of the trial rather than to exclude relevant evidence on that basis. Unfair surprise is usually coupled with danger of prejudice and confusion of the issues.

The Trial Court should have included the cassette tapes in the evidence, because they were highly probative of the issue of whether Robinson was properly terminated from the FAA certification program. Instead of viewing the actual evidence of Robinson's performance, the Trial Court relied upon the biased testimony of Robinson's two instructors. It would have been more appropriate for the Trial Court to allow the evidence in, and impose other sanctions under Rule 37 of the Federal Rules of Civil Procedure.

Upon reviewing a judgment of a Court of Appeals, the Supreme Court may reach back into the proceeding in the lower court to correct interlocutory orders or errors that occurred prior to the Court of Appeals' entry of judgment and materially affected the subsequent proceeding. Hamilton - Brown Shoe Co. v. Wolf Brothers Co., 240 U.S. 251, 258, 36 S.Ct. 269, 60 L.Ed. 629.

IV. CONCLUSION

Arthur B. Robinson presented direct evidence of discrimination to the Trial Court. The Trial Court and the Court of Appeals for the Tenth Circuit did not make the determination of whether Robinson had presented direct evidence of discrimination.

The Tenth Circuit Court of Appeals held that the FAA only needed to come forward and produce evidence of nondiscriminatory reasons for its termination of Robinson from the air traffic controller certification program. The Tenth Circuit should have required the FAA to prove its nondiscriminatory reasons and rebut Robinson's prima facie case by a preponderance of the evidence. The Tenth Circuit did not apply the correct standard in its analysis of the shifting burden of proof in Robinson's Title VII case.

The Trial Court improperly excluded cassette tapes of Robinson's performance from the evidence. The Trial Court did not give proper weight to the evidence of the FAA's employment statistics and the FAA's failure to follow its own procedures in training and testing Mr. Robinson. Thus, the Trial Court erred in its conclusion that the reasons offered by the FAA for Robinson's discharge were not mere pretexts for discrimination.

Certiorari should be granted because the Tenth Circuit has issued an opinion that is inconsistent with U.S. Supreme Court opinions and other opinions of federal Courts of Appeals.

Respectfully submitted,

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